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IN THE

Supreme Court of the United States

October Term, A. D. 1938.

No. 20

J. O. STOLL,
Petitioner,

vs.

WILLIAM GOTTLIEB,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

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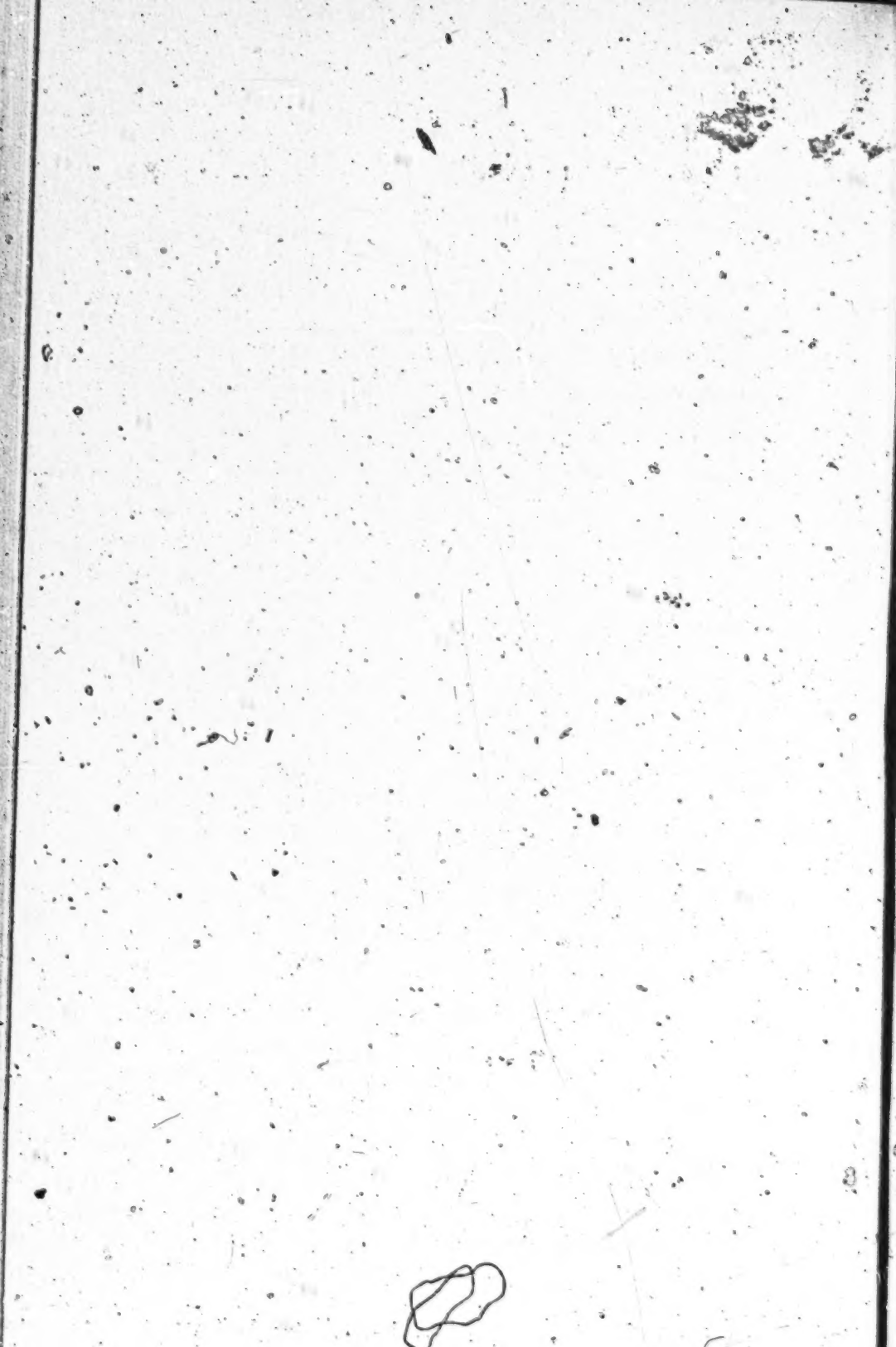

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is reported in 368 Ill. 88, and appears in full beginning at page 63 of the Record filed herein.

The opinion of the Appellate Court of Illinois, First District, is reported in 289 Ill. App. 595, and appears in full beginning at page 41 of the Record filed herein.

Both opinions contain a statement of the facts and questions decided by the respective courts.

JURISDICTION OF THIS COURT.

Respondent concedes without argument that this Honorable Court has jurisdiction of this cause and gladly submits all questions appertaining thereto for decision.

STATEMENT OF THE CASE.

The facts in this case are set out in the opinion of the Supreme Court of Illinois (368 Ill. 88; R. 63) and the Appellate Court of Illinois, First District (289 Ill. App. 595; R. 41).

Questions Presented:

According to respondent's theory of this case, the questions presented are:

A.

1. To what degree of faith, credit and effect in a State Court is the judgment or decree of a United States District Court, sitting in bankruptcy under Section 77B of the Bankruptcy Act for the reorganization of a debtor corporation entitled, if entered without jurisdiction and power and in violation of the said Act?

2. Can the question of jurisdiction and power of such court be inquired into in a collateral action in a State Court under the "full faith and credit" clause of the Constitution of the United States?

B.

1. Is a decree confirming a plan of reorganization of a corporation in proceedings under Section 77B of the Bankruptcy Act, which, amongst other things cancels a guaranty, absolutely void in whole or in part and therefore subject to collateral attack?

SUMMARY OF ARGUMENT.

I. The Supreme Court of Illinois did not refuse and did not fail to give that degree of full faith and credit to the judgment of the Federal Court to which it was entitled.

A. Under the "full faith and credit" clause of the Constitution of the United States, the question of jurisdiction and power was rightfully and properly inquired into by the Supreme Court of Illinois.

II. The Supreme Court of Illinois rightfully declared that the Federal Court did not have jurisdiction of the subject matter of the guaranty and rightfully held that that part of the plan of reorganization and decree confirming it which cancelled the guaranty was void and subject to collateral attack.

ARGUMENT.

I.

The Supreme Court of Illinois did not refuse and did not fail to give that degree of full faith and credit to the judgment and decree of the Federal Court to which it was entitled.

It is true that this court has said that judicial proceedings of a federal court must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another state. However, it cannot be denied that if the judicial proceedings of another state are void because the court exceeded its jurisdiction and power, then the courts of Illinois could and should refuse to give credit to same. This refusal would be just and proper even if that court did determine that it had jurisdiction and power and proceeded wrongfully. It is hardly believable that the "full faith and credit" clause would impose an absolute duty on a state court to abide by the judicial proceedings of a federal court that are void and be bound by them regardless of the consequences.

15 R. C. L. 929-932, Sec. 408 (Appendix, p. 32).

In approving a state court's inquiry on a judgment of a federal court, this court held in *Dupasseur* v. *Rochereau*, 88 U. S. 130, on page 135, that the state court did not refuse to accord due force and effect to the judgment of the federal court by ignoring it; that the judgment could not have any greater force or effect than

judgments in the state courts rendered under like circumstances.

A. Under the "full faith and credit" clause of the Constitution, the question of jurisdiction and power of the Federal Court to cancel the guaranty was rightfully and properly inquired into by the Supreme Court of Illinois.

Section 1 of Article IV of the Federal Constitution concerning "full faith and credit" does not forbid inquiry as to the federal court's power to cancel the guaranty or as to the jurisdiction of that court over the person or in respect to the subject matter.

Reynolds v. *Stockton*, 140 U. S. 254.
Pennoyer v. *Neff*, 95 U. S. 714, 727, 729.
Thompson v. *Whitman*, 85 U. S. 457.
Harris v. *Hardeman*, 14 How. (U. S.) 334.
D'Arcy v. *Ketchum*, 11 How. (U. S.) 165.
Williamson v. *Berry*, 8 How. (U. S.) 495, 540.
Christmas v. *Russell*, 5 Wall. (U. S.) 290.
Rose v. *Himely*, 4 Cranch (U. S.) 269.
15 R. C. L. 929-932, Sec. 408.
15 R. C. L. 990, Sec. 463.

In *Thompson* v. *Whitman*, *supra*, on page 469, this court said,

> "on the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the Fourth Article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Petitioner cites several cases and one text on page 11 of his brief to support the proposition to which respondent

agrees that judgments of the federal courts are entitled to the *same* full faith, credit and effect in the state courts as the judgments of the courts of a sister state under Article IV of the Constitution. However, in *Knights of Pythias* v. *Meyer*, 265 U. S. 30, it was held that a decree of a federal court in Indiana was not binding in the state court of Nebraska. This case supports respondent's contention that a judgment of a federal court is never absolute but can always be inquired into and disregarded.

Hancock National Bank v. *Farnham*, 176 U. S. 640, also limits the meaning of the "faith and credit" clause. On page 644, this court stated in referring to an attack on the decree of the federal court of Kansas that "the only defences which he can make against it are those which he could make in the courts of Kansas." It cannot be denied therefore that respondent had the right to question the jurisdiction and power of the federal court to cancel the guaranty because under no circumstances could this particular guaranty be cancelled in any court in view of the provisions of the Bankruptcy Act.

In 15 R. C. L. 989, Sec. 463 cited by petitioner, it is stated on page 990 that,

> "proceedings of the United States Courts may be inquired into by the state courts for the purpose of seeing whether the federal courts had jurisdiction or authority to render such judgment or decree," (citing several cases),—"and also whether the executory proceedings *under it have been conformable to law.*" (Italics ours.)

To the same effect—*Adams* v. *Terrell*, 4 Fed. 796, 800, 801.

In *Harrington* v. *People*, 6 Barbour (N. Y.) 607, the court held (1) that the jurisdiction of a court, whether of a general or limited jurisdiction, may be inquired into,

although the record of the judgment states facts giving it jurisdiction; (2) *that no court can acquire jurisdiction by the mere assertion of it.*

II.

The proceedings in the United States District Court and the decree cancelling the guaranty herein do not constitute an estoppel by verdict nor is the judgment res judicata.

A. In estoppel by verdict, the court entering the order decree or judgment set up as an estoppel must have the power and jurisdiction to so enter the order decree or judgment if it would be binding on the parties in subsequent litigation.

Miller v. *Rowan*, 251 Ill. 344, 348.
Munroe v. *People*, 102 Ill. 406, 409, 410.
Okon v. *Kaenas, et al.*, 222 Ill. App. 45, 48.

The reasoning of the court as to its powers is less regarded than the judgment and decree itself and the premises which it necessarily affirms. This court must therefore look into the federal court's decree and orders for the proper decision of this cause.

Deke v. *Huenkemeier*, 289 Ill. 148, 154.
Pennoyer v. *Neff*, 95 U. S. 714, 727.

In *Okon* v. *Kaenas, et al., supra*, where a court in foreclosure proceedings entered a money decree and gave credit to the defendant for money paid to the original holder of the note and upon suit by the same plaintiff against the same defendant to recover the money credited in the foreclosure suit, it was held the plea of *res judicata* bad for the reason that the suit upon the note was an action *in personam*, while the foreclosure proceedings

was a suit *in rem*, that the court had no *power* to enter a money decree and credit defendant for money paid to original holder of the note. Cited case and the one at bar are quite analogous. The proceedings in the District Court in this case was one *in rem* for the purpose of reorganizing the "debtor" corporation and *for this alone* did the court have jurisdiction and power.

B. Motion of ~~petitioner~~ respondent in the Federal Court to vacate the decree and orders cancelling the guaranty entered almost two years prior thereto for the reason that that court had no power and jurisdiction in that reorganization proceeding under Section 77B of the Bankruptcy Act to so cancel the guaranty, did not confer validity upon that part of the decree otherwise void.

The opinion of the majority of the Justices of the Appellate Court of Illinois which petitioner seeks to affirm cite the case of *Chamblin* v. *Chamblin*, 362 Ill. 588, to support the proposition that ~~petitioner~~ respondent cannot now complain because the question of the power of the District Court to cancel the guaranty was once put in issue by this motion and the order of the District Court bars him forever. However, the case cited and misapplied, is one involving the law pertaining to jurisdiction *over the person* and *not jurisdiction over the subject matter* as in the case at bar. The facts in the *Chamblin* case and the distinction between it and the case at bar are set forth in the opinion of the Supreme Court of Illinois. (R. 67.)

The doctrine of *res adjudicata* can always be applied to a former adjudication if there is a finding that the court has jurisdiction over the person and in *fact* does have jurisdiction over the subject matter and such is the

case cited. The question of jurisdiction over the *subject matter* was never questioned in the *Chamblin* case but it is questioned in the case at bar and *that question must be settled in this proceeding. It is absolutely necessary to go into the question of the power of the Federal Court to cancel the guaranty because if no power can be shown, then there is no estoppel nor res adjudicata.* The Appellate Court's opinion was in substance an avoidance of the real issue in this case which is not necessarily the issue of estoppel and *res adjudicata* but one of jurisdiction over the subject matter of the guaranty. This issue the Supreme Court of Illinois recognized and rightfully ruled that the federal court had no such jurisdiction. *Moreover, the validity of every judgment depends upon the jurisdiction of the court before it is rendered and not upon what may occur subsequently.*

Pennoyer v. *Neff*, 95 U. S. 714, 727.

In *Goudy* v. *Hall*, 30 Ill. 109, the Supreme Court says on p. 116,

> "But upon the question of the right of the court to act upon the persons or rights of parties, we think there is great propriety in holding that the *finding of the court is not conclusive.*"

To the same effect is *Adams* v. *Terrell*, 4 Fed. 796, 800, 801. Even if an attack upon the jurisdiction of the federal court were made therein, it still can be proved at any time and at any place by reference to the laws of the United States that the federal court did not have jurisdiction of the subject matter of the guaranty and did not comply with Section 16(a) of the Bankruptcy Act.

103 A. S. R. 307, 309.

In *Brougham* v. *Oceanic Steam Navigation Co.*, 205 Fed. 856, 859, 860, the court said,

> "It is sometimes said that every court has jurisdiction to determine its own jurisdiction. A court must as an incident to its general power to administer justice have authority to consider its own right to hear a cause. *But the mere decision by a court that it has such right when it does not exist does not give it authority.* A court by moving in a cause assumes authority *but assumption does not confer it.*
>
> The jurisdiction of a court depends upon its right to decide a case and never upon the merits of its decision. When a court makes an order in a cause over which it has no jurisdiction, it is a nullity. Similarly, if a court have jurisdiction of a cause and yet make an order in it beyond its power, the order is void. In the one case there is action without authority; in the other, action in excess of authority. In both cases, the order is a nullity. *Ex Parte* Fisk, 113 U. S. 713; *In re* Sawyer, 124 U. S. 200." (Italics ours.)

Petitioner on pages 13 and 15 of his brief cites several cases to support the doctrine that a court which has *general jurisdiction over the subject matter* is competent to decide questions as to its jurisdiction, and therefore such decisions are not open to collateral attack. This doctrine begs the very issue in question, the issue as to the federal court's jurisdiction and power over the subject matter of this guaranty. In *Ex Parte* Harding, 219 U. S. 363, the question was whether the judgment of a federal court declining to remand a case to a State Court from which it was removed was reviewable by mandamus; in other words, that that writ may *be used to subserve the purpose of an appeal.* This court held that jurisdiction has been given to the federal court to determine whether the cause is one for removal and therefore denied the writ. *There was no question involved therein*

pertaining to collateral attack or jurisdiction over the subject matter but the only question, the exercise of judicial discretion. However, this court did distinguish therein the case of *Virginia* v. *Rives*, 100 U. S. 313, wherein a writ of mandamus did issue because the federal court abused its discretion disclosed by the power attempted to be exerted and impliedly held that no appeal would be necessary.

In *Dowell* v. *Applegate*, 152 U. S. 327, this court held that in removing the cause from the state court, the federal court rightfully assumed jurisdiction and did have jurisdiction over the issues and the subject matter of the deeds in question. This case and the *Harding* case involve findings of jurisdictional facts for removal and not questions of jurisdiction over the subject matter.

In *Forsyth* v. *Hammond*, 166 U. S. 506, this court held invalid an attack in a Federal Circuit Court of Appeals upon a decision of the Indiana Supreme Court in a matter that was peculiarly within the domain of state control, to be finally and absolutely determined by that Supreme Court. Indiana Supreme Court held that the lower court in that instance had jurisdiction over the subject matter pertaining to territorial boundaries of a municipal corporation. Likewise, state courts cannot deny the correctness of a ruling of this Honorable Court in construing Section 77B of the Bankruptcy Act but *what is there to prevent a state court from ignoring a decree or order of a lower federal court in construing this section when such state court is aided and guided by decisions of Federal Circuit Courts of Appeal and which it follows.*

Rew v. *School District*, 125 Iowa 28 and *Chicago Title and Trust Co.* v. *Storage Co.*, 260 Ill. 485 involve the doctrine of estoppel by verdict where the issues decided

were the identical in both courts and where the courts had jurisdiction over the subject matter.

In the removal cases cited on page 15 of petitioner's brief, the federal courts have jurisdiction over the subject matters and the only questions involved pertain to the legal effect of the facts for removal and the discretion of the court in permitting or refusing removal.

III.

The Bankruptcy Act prohibits the cancellation of a guaranty and there is no authority in Section 77B of that act as amended or elsewhere giving the Federal Court, while sitting in bankruptcy under Section 77B for reorganizing a "debtor" corporation, power and jurisdiction to cancel a guaranty.

A. The Pertinent Statutes and cases in point.

Section 16(a) of the Bankruptcy Act prohibits and Section 77B does not authorize, alteration of rights against third party guarantors. Section 16(a) provides that:

> "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Section 77B(b) provides that:

> "A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, (10) may deal with *all or any part of the property of the debtor and* may include any other appropriate provisions not inconsistent with this section."

The rights of creditors here referred to are rights against the debtor in reorganization, not rights against

parties other than such debtor. The property to be dealt with is the property of the debtor in reorganization, not property of parties other than such debtors. Section 77B (h) provides that "the final decree shall discharge the debtor from *its* debts and liabilities * * *." Clearly the only debts that may be discharged are debts of the debtor in reorganization, *not debts of parties other than such debtor.* Section 77B (k) provides that all other provisions of the Bankruptcy Act not inconsistent with Section 77B shall apply thereto, and Section 77B (o) provides that *jurisdiction under 77B shall be the same as that which results from a voluntary petition and adjudication in bankruptcy.*

It thus appears that Section 77B does not contain any provisions that might authorize alteration of rights against third party guarantors, which rights are *expressly* preserved in Section 16(a). Indeed, Section 77B, which relates to corporate debtors exclusively, does not even contain provisions analogous to Section 76, which, in relation to individual debtors, *extends* the obligation of the guarantor to correspond to the extension granted to the individual debtor liable for the debt guaranteed. Section 76 merely *extends* the guaranty but does not *cancel* it which the District Court had no power to do in the case at bar. Section 76 of the Bankruptcy Act relative to the extension of the guaranty does not apply to Section 77B proceedings and has no relation to any situation that may be created under them. *In re Hygrade Dye Works, Inc.*, C. C. H. Dec., Sec. 3083.

Nor is Section 77B inconsistent with Section 16(a). The additional jurisdiction "for the relief of debtors" to be exercised under Section 77B, and conferred by Section 77A, is limited to the relief of debtors *in* reorganization. It does not extend to the relief of a guarantor of

obligations of such a debtor, or to the relief of a guaranty of obligations upon which he is primarily and personally liable. Accordingly, Section 77B, which does not purport to affect rights against third party guarantors not in reorganization, cannot be inconsistent with Section 16(a) which preserves such rights. Both sections can and should be given full effect. Repeals by implication are not favored.

Continental Bank v. *Rock Island Ry.*, 294 U. S. 648, 670, 672, (holding that Section 77B is strictly a law on bankruptcy).

United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396.

General Motors, etc., Corp. v. *United States*, 286 U. S. 49, 61.

Frost v. *Wenie*, 157 U. S. 46, 58.

Delaware Tribe of Indians v. *United States*, 84 Ct. Cl. 535.

It may be said that bankruptcy proceedings are equitable in their nature but they are to be administered in accordance with the Bankruptcy Act and general orders and *not under any broad unlimited equity power.*

Bardes v. *Bank*, 178 U. S. 524, 535, 20 Sup. Ct. 1005, 44 L. Ed. 1175.

In re Judith Gap Commercial Co., 5 F. (2d) 307, 309.

Johnson v. *Norris*, 190 F. 459, L. R. A. 1915—13,884.

Westall v. *Avery*, 171 F. 626.

Woods-Drury, Inc. v. *Superior Court*, 63 P. (2d) 1184.

City Real Estate Co. v. *Realty Const. Corp.*, 3 N. Y. S. (2d) 312.

They are confined to controversies relating to a bankrupt estate and within this limited area.

Southern Bell Telephone & Tel. Co. v. *Caldwell, et al.*, (C. C. A. 8) 67 F. (2d) 802.

Sessler v. *Nemoof*, 183 F. 656.

Central Fibre Products Co. v. *Bacher*, 112 S. W. (2d) 372, 376 (Mo.) Nov. 15, 1937.

In has been held that bankruptcy courts under the act have no jurisdiction of independent suits at law or in equity. *Maryman* v. *S. G. Dreyfus Co.*, 174 S. W. 549 (Ark.). In *Bush* v. *Elliott*, 202 U. S. 479, 26 Sup. Ct. 670, 50 L. Ed. 1114, it was held that it was the evident purpose of Congress to limit the jurisdiction of the federal courts sitting in bankruptcy in respect to controversies which did not even come *simply* within the jurisdiction of those courts. To the same effect are *Bardes* v. *Bank, supra; In re Smith*, 7 F. Supp. 863, 864 and *In re Hageman*, 10 F. Supp. 716.

Petitioner on page 18 of his brief cites *Continental Bank* v. *Rock Island Ry. Co.*, 294 U. S. 648, to support the proposition that proceedings under Section 77 of the Bankruptcy Act are proceedings in equity. The question therein was whether the bankruptcy court in reorganizing a debtor railroad had the power to enjoin the sales of bonds held by five banks as security for collateral notes of the railway company, if such sales would so hinder, obstruct and delay the consummation of a plan of reorganization as probably to prevent it. This court found that the bankruptcy court had *statutory* authority to issue the injunction and the injunction goes no further than *to delay* the enforcement of the contract. Would it then follow from the case that the bankruptcy court had the further equitable power, if it so desired to act, to *cancel* the contract as it has attempted to do in this case before the bar? Surely constitutional limitations prevent this!

Petitioner cites *Louisville, etc., Railway Co.* v. *Louisville Trust Co.*, 174 U. S. 552, to support his contention that

a guaranty may be cancelled in equity. There was no question involved as to the power of the *federal court in equity* to cancel the guaranty. Furthermore this court stated on page 577 that it had the power to cancel the guaranty *only* as to purchasers with notice. It is therefore apparent that even a court of equity with plenary powers cannot cancel a guaranty, which cancellation would affect those without notice of the defect as well as those with notice. Furthermore the cases are not analogous, inasmuch as the case at bar does not involve a general court of equity but a bankruptcy court with limited equitable powers.

In *Sharon* v. *Terry and Thompson* v. *Irrigation District*, petitioner's brief, page 18, the federal court as a *court of equity* had the power to cancel a forged marriage contract and to remove a cloud upon the title of personal property. The case at bar involves a bankruptcy court and not an equity court so the cited cases are not applicable. There is nothing in the record to show that the District Court did indicate any provision in Section 77B upon which its jurisdiction and power to cancel the guaranty might be based. *There is none.* The District Court has no power to enter the decree cancelling the guaranty which did nullify Section 16(a). *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204. Congress did not give the power and this is apparent by its silence. It is even true that Section 77B does not even give jurisdiction to the District Court over property of the bankrupt which it holds in trust for a third party. *In re Commonwealth Bond Corp., Debtor*, 77 Fed. (2d) 308. That court when sitting in bankruptcy is none the less a separate and distinct court, and exercising powers and jurisdiction *separate and distinct* from its powers and jurisdiction as a district court. *Norris* case, 18 F. Cas. No. 10,304.

B. The Constitutional Question.

The Constitutional question involved in the extension of Section 77B jurisdiction beyond property of the debtor has been noted by the court in *In re Commonwealth Bond Corporation*, 77 Fed. (2d) 308, 309. If Section 77B may be so construed as to empower the District Court to cancel the Guaranty, it would violate the Fifth Amendment which provides: "* * * nor shall any person * * * be deprived of * * * property without due process of law."

Louisville, etc., Bank v. *Radford*, 295 U. S. 555, 589, 601.

C. The District Court sitting in bankruptcy under Section 77B of the Bankruptcy Act for reorganizing a "debtor" corporation was a court of limited jurisdiction and power, that is, limited in respect to the subject matter over which it may exercise jurisdiction.

Wheeling Structural Steel Co. v. *Moss*, 62 F. (2d) 37.

Chicago Bank of Commerce v. *Carter*, 61 F. (2d) 986, 988.

Nixon v. *Michaels*, 38 F. (2d) 420, 423.

In re Stearns, 295 F. 833.

Finn v. *Carolina Portland Cement Co.*, 232 F. 815 (C. C. A.).

In re Hollins, 229 F. 349.

Nelson v. *Sven, etc.*, 178 F. 136, 140.

Henrie v. *Henderson*, 145 F. 316, 319.

Remington on Bankruptcy, 3rd Ed. (III).

1. A Federal Court cannot have the power to enter a decree or order except when authority is found in the

Constitution of the United States and statutes made pursuant thereto. *The People* v. *Seelye*, 146 Ill. 189, 221; *State of Rhode Island* v. *Massachusetts*, 12 Pet. (U. S.) 657, 720; *Munroe* v. *People*, 102 Ill. 406, 409; *Jones* v. *Kansas City, etc., Co.*, 1 F. (2d) 649, (C. C. A.); Collier on Bankruptcy, 13th Ed., Vol. 1, p. 42. The District Court's powers are limited by the language of the Bankruptcy Act. *Chicago Bank of Commerce* v. *Carter, supra; In re Converse-Hough & Co., Inc.*, 27 F. (2d) 368, 369; *Nierman* v. *Industrial Commission*, 329 Ill. 623, 627. Power not conferred by that act it does not possess. *Adams* v. *Terrell*, 4 F. 796, 801 (holding proceedings of a bankruptcy court subject to collateral attack) and see cases cited therein.

The test in determining whether the District Court had the power to cancel the guaranty is whether that court, under the circumstances, would have authority to enter such decrees and orders cancelling the guaranty. *O'Connor* v. *Board of Trustees*, 247 Ill. 54, 57. It is obvious that under Section 16(a) of the Bankruptcy Act, it had no such authority: there is no authority in Section 77B, nor is there authority in equity to cancel the guaranty.

Congress, by enacting Section 16(a) of the Bankruptcy Act, providing that the discharge in bankruptcy of a principal debtor shall not release the guarantor, and by remaining silent as to that point in Section 77B, appears to have clearly manifested its intention that controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits upon the guaranty, should not come within the power of the District Court.

2. The District Court in decreeing the Cancellation of the Guaranty did not comply with the Bankruptcy Act and that part of the decree is a nullity.

The District Court did not act judicially in all things before it. It transcended the power conferred by the Bankruptcy Act. It could not be conceded that if the action were upon a money demand, the court notwithstanding its complete jurisdiction over the subject and the parties, has power to pass judgment of imprisonment upon the defendant. *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *Windsor* v. *McVeigh*, 93 U. S. 274, 282. So much of the decree of the District Court as was in excess of its powers is void.

The general language of Section 77B of the Bankruptcy Act, although broad, cannot be held to apply to the guaranty because the question pertaining to the cancellation of the guaranty is *specifically* dealt with in Section 16 (a) of the Bankruptcy Act. *United States* v. *Chase*, 135 U. S. 255, 260. The specific terms of Section 16 (a) prevail over the general terms in Section 77B. *Kepner* v. *United States*, 195 U. S. 100, 125. The plain mandate of Section 16 (a) cannot be set aside because of consideration which may appeal to the referee or judge as falling within general principles of equity jurisprudence. *Burton Coal Co.* v. *Franklin Coal Co.*, 67 F. (2d) 796.

D. Under the decisions in In re Diversey Building Corporation, 86 Fed. (2d) 456, wherein this court denied a petition for certiorari, 300 U. S. 662, No. 636, and In re Nine North Church St., Inc., 82 Fed. (2d) 186, 188, and other cases cited herein, the Federal Court was wholly without jurisdiction of the subject matter of this guaranty, and its orders and decree pertaining to the cancellation of the guaranty are absolutely void and subject to collateral attack.

The leading cases on this point, those cited above, state point blank and *without equivocation, or reservation,* that

a Federal Court is without jurisdiction to cancel a guaranty while it is sitting in Bankruptcy under Section 77B for the reorganization of a "debtor" corporation.

The facts in the *Diversey Bldg. Corp. case* are as follows: On June 28, 1935, the District Court of the United States, entered a decree consummating the reorganization of the Diversey Bldg. Corporation. The plan contemplated the release of Becklenberg from his guarantee of the bond issue. On October 16, 1935, the debtor filed its petition for a restraining order in the District Court to restrain and enjoin on Weber and other creditors from prosecuting their suits at law or in equity against Becklenberg on his guaranty. Weber, in his answer to the petition, alleged a denial of the Court's jurisdiction to restrain him from proceeding against Becklenberg. The court, however, entered a perpetual restraining order enjoining Weber and other creditors from prosecuting their lawsuits against Becklenberg from which order Weber and others appealed. The appellants did not accept the plan and from the decree of June 28, 1935, there was no appeal.

The Circuit Court of Appeals of the same circuit wherein this case at bar was decided states in its opinion:

> "The question here presented is whether the District Court had the power to release Becklenberg from his guaranty of the old bond issue in consideration of his guaranty of the new bond issue, pursuant to the reorganization plan which had been approved by the court after its acceptance by two-thirds in amount of the allowed and effected claims of each class of creditors, but which had not been accepted by appellants, who were bondholders of the original issue.
>
> This question must be answered in the negative • • • the trouble here is that the court exceeded its jurisdiction with respect to the subject matter before it."

The court further states in its opinion that it is in accord with the conclusions expressed in the *Nine North Church Street case* where the facts are very similar.

The Circuit Court of Appeals in the *Nine North Church Street* case held specifically that the obligation arising by virtue of the guaranty are not affected by the reorganization of the debtor; that any modification of the guaranty can only be justified by the bankruptcy power which extends only to the relief of insolvent and hard pressed debtors; that the guarantor cannot modify its obligations by the reorganization of other insolvents; that Section 16 (a) of the Bankruptcy Act expressly reserving a creditor's rights against the guarantor of a discharged bankrupt's debts, shows that an alteration of the guarantor's liability is not conceived to be essential to the debtor's reorganization; that the District Court had no jurisdiction to enjoin suit on the guaranty and *was without jurisdiction as to claims against the guarantor.*

See:

In the Matter of Utilities Power and Light Corp., Debtor, 91 F. (2d) 598.

In re Prudence Bonds Corp., 79 Fed. (2d) 212, 215.

In re 1775 Broadway Corporation, 79 Fed. (2d) 108, 110.

Brumley v. *Jones,* 141 F. 318.

Collier Supp. Sec. 77B; Am. B. R. Digest, Sec. 1279-a).

The Supreme Court of Illinois has gone very far in upholding the principles for which a guaranty stands. In the case of *Holm* v. *Jamieson,* 173 Ill. 295, 300, a corporate note was declared by a court of equity void for want of authority of the treasurer of the corporation to execute the same. The holder sued the guarantor and this

court held that the action of the court of equity holding note void does not release the absolute guarantor and the plea setting up the decree is bad. This was a collateral attack on the judgment of another court which actually did have jurisdiction of the subject matter.

The New York Court of Appeals on July 13, 1937, went even further than the cases cited above. In *Union Trust Co. of Rochester* v. *Willsea*, 275 N. Y. 164, 9 N. E. (2d) 820, there was an action on a guaranty of payment executed and delivered by appellant to respondent of the indebtedness of the Willsea Works, a corporation which filed its petition for reorganization under Section 77B. In the proceeding in the federal court, respondent creditor filed its claim against the principal debtor which represented the same indebtedness as set up in the complaint against appellant-guarantor and actively participated in the proceedings therein and even accepted 915 shares of stock under the confirmed plan of reorganization.

It was urged by the guarantor that the acceptance of that stock and the participation by the creditor in the proceedings constituted full payment of the guaranty. *The court however held that no matter what actions the creditor did take, still there could be no payment by virtue of the reorganization proceedings and the federal court has no jurisdiction to adjudge that the claim was by the proceedings paid and discharged; that the proceedings under Section 77B involved the debtor and its creditors and did not in any way affect the independent guaranty agreement; that such proceeding is subject to all other applicable provisions of the Bankruptcy Act.* The court points out that no provisions of the act are referred to it whereby a guarantor of a debt of the bankrupt is relieved of liability as the result of a proceeding under Section 77B, unless such guarantor has himself been

adjudicated not liable in a proceeding instituted by or against him as a result of his own insolvency.

In a very recent case decided August 28, 1937 in the District Court, S. D. of New York, it was held that a bankruptcy court in reorganization of a corporation has no power to issue injunctions against suits in other courts involving an insurance company in which the debtor owns stock, even though the institution of such suits or proceedings may have an adverse effect on assets of the debtor, the court reasoned therein that the insurance company was not in reorganization. *In re Madison Mortgage Corporation,* 22 F. Supp. 99.

See *Chauncey, et al.* v. *Dykes Bros., et al.,* (C. C. A. 8) 119 F. 1, 3, wherein it was held that the bankruptcy act, confers no such authority on the court to assume jurisdiction of a controversy between third parties, merely because the claimants happened to be creditors of the bankrupt estate. *In re Pyrocolor Corp.,* 46 F. (2d) 554.

In *In re 1775 Broadway Corporation, supra,* which petitioner inadvertently misquoted on page 19 of his brief, the Circuit Court of Appeals held that provisions of a plan releasing trustee of tort claims against it were properly disapproved by the district court especially *since that court did not have jurisdiction* of non-assenting noteholders to release tort claims and since claims were not against debtor or its assets or such as were required to be settled in order to bring the property into the reorganized company.

Petitioner is now attempting to convince this Honorable Court that the decision of the Appellate Court of Illinois for the First District, First Division was correct and that the decision of the Supreme Court of Illinois was

incorrect. The Appellate Court in this case stated through Mr. Justice O'Connor:

> "In this state of the record, we would not be warranted in disturbing the judgment of the District Court in this collateral proceeding *unless it was clear that the District Court was wholly without jurisdiction and this we are unable to say.*" (Italics ours.) (R. 44.)

However, this doubt referred to no longer exists, because in the case of *Johnson* v. *Finn*, 14 N. E. (2d) 240, decided April 25, 1938, the same Appellate Court held:

> "A guaranty of payment of the issue of corporation's bonds was not in any way affected, discharged, or abrogated by proceedings in the federal court for the reorganization of the corporation under the Bankruptcy Act, wherein new bonds were issued and holder was compelled to accept new bonds under penalty for contempt, since the court was without jurisdiction to impair the guaranty."

Petitioner states on page 20 of his brief that in the case of *In re Central Funding Corporation*, the plan of reorganization released the guarantor and the approval of this plan indicates that the federal court has the power to modify an existing guaranty. *Petitioner fails to point out to this Honorable Court that the guarantor therein was the debtor being reorganized.* The Circuit Court of Appeals on page 258 states that, "the plan is part of the general plan for the reorganization of the *surety* company." No question could arise if petitioner went through bankruptcy to relieve himself of the guaranty liability but he cannot do it in the reorganization proceedings of the principal obligor.

IV.

That part of the decree of the District Court which attempts to cancel the guaranty is an absolute nullity and subject to collateral attack.

A. The District Court exercised powers to which Section 77B of the Bankruptcy Act had no application and exceeded the powers given it by that section.

It is contended that where a court has jurisdiction of the parties and the subject matter, its decree, however erroneous, can only be attacked on appeal or error; however this rule is subject to an exception equally well settled—that a decree may be void because the court *exceeded* its jurisdiction. In *Armstrong* v. *Obucino*, 306 Ill. 140, the bill prayed for the enforcement of the lien by a sale beyond and contrary to the powers given by the statute for enforcing Mechanic's Liens and the court held that because the court had acquired jurisdiction of the parties and subject matter, it does not follow it could make such a decree as was prayed for; *that if courts transcend their lawful powers, their decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question.* To the same effect are *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *In re Sawyer*, 124 U. S. 200, 220; *U. S.* v. *Walker*, 109 U. S. 258; *Windsor* v. *McVeigh*, 93 U. S. 274; *Adams* v. *Terrell*, 4 Fed. 796, 800; *Novak* v. *Kruse*, 211 Ill. App. 274; *Great Western Tel. Co.* v. *Barker*, 56 Ill. App. 402; *Risley* v. *Phenix Bank of New York*, 83 N. Y. 318, 337.

This Honorable Court, in issuing a writ of mandamus in *Ex Parte Wisner*, 203 U. S. 449, where the federal court had already determined it had and did assume

jurisdiction over the parties and the cause, found that there was an absolute want of authority of the federal court over the case. *Even in view of the fact that the parties had the right to appeal*, this court issued the writ of mandamus which is analogous to a collateral attack upon the judgment of a federal court entered without jurisdiction or power.

In *Hovey* v. *Elliott*, 167 U. S. 409, 444, wherein the Supreme Court of the District of Columbia ordered the answer of the defendant in a chancery suit pending in that court stricken from the files and entered a decree that the bill be taken *pro confesso* because he was held to be guilty of contempt, this court held that that court did not possess the power to disregard an answer and the judgment based upon the exercise of such an assumed power is void for want of jurisdiction *and may therefore be collaterally attacked*. This case is strongly in this respondent's favor because there is no doubt that the Supreme Court of the District of Columbia had jurisdiction over the subject matter in the first instance but *exceeded* its jurisdiction when it ordered the answer of the defendant stricken from the files.

To the same effect is *Reynolds* v. *Stockton*, 140 U. S. 254, wherein this court held that a decree which passes upon questions not at issue in the cause and rendered against a party who had taken no actual part in the litigation subsequent to the filing of his answer, is void and subject to collateral attack. Respondent here took no actual part in the bankruptcy proceedings and the decree which cancels the guaranty is void inasmuch as the guaranty was not legally in issue.

In *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, this court held that a decree for foreclosure against an absent defendant brought in by publication that was

short of the full period required by law, is a nullity and subject to collateral attack. This case is even stronger than the one at bar inasmuch as the court did have jurisdiction to enter the decree but entered same erroneously and irregularly and did not comply with the *exact* wording of the statute.

In *In re* Southern States Finance Co., 19 F. (2d) 959, there was a collateral attack by a federal court upon another federal court's order of adjudication. There an adjudication of bankruptcy was made by a district court of Delaware and a trustee was qualified. Another petition for adjudication was filed in a district court of North Carolina for the same corporation. A petition was filed in the district court of Delaware to transfer case to the North Carolina district for consolidation which petition was opposed upon the ground that a prior petition had been filed in the Delaware court and the court of North Carolina was without jurisdiction to entertain petition or to make the adjudication that it did make. It was held in the Delaware court that the power essential to the existence and exercise of original jurisdiction was wholly wanting in the Carolina court, that courts of bankruptcy have no jurisdiction other than expressly or by necessary implication conferred upon them by the Constitution and the Statutes.

However, in the case at bar, the District Court did not even have the *power* to cancel the guaranty and not only *exceeded* its powers given by Section 77B but *usurped* another power that was never given to it. It cannot be controverted that such a decree would be subject to collateral attack and there are numerous cases to support the statement.

In re Sawyer, 124 U. S. 200, 220.

The Confiscation Cases, 20 Wall. (U. S.) 92.

Sharon v. *Terry*, 36 Fed. 337, 346.
Rabbit v. *Weber & Co.*, 297 Ill. 491, 495.
Demilly v. *Grosrenaud*, 201 Ill. 272, 273.
Kenney v. *Greer*, 13 Ill. 432.
Ashlock v. *Ashlock*, 360 Ill. 115, 122.
Risley v. *Bank*, 83 N. Y. 318, 337,

And since the District Court proceeded without jurisdiction and power to cancel the guaranty, it matters not how technically correct and precise the form of the record appears. Its decree in part is void and must be so declared; the authority was wholly usurped and the decree was the exercise of arbitrary power under the forms, but without sanction of law.

Ritchie v. *Sayers*, 100 Fed. 520, 532.
People v. *Seelye*, 146 Ill. 189, 221.
Hernandez v. *Drake*, 81 Ill. 34.
Swiggart v. *Harber*, 4 Scam. (Ill.) 364.
Sheldon v. *Newton*, 3 Ohio St. 494.

B. Because the District Court had no power to cancel the guaranty, it was unnecessary to appeal from its orders or decrees because they are subject to collateral attack.

People v. *Leavens*, 288 Ill. 447, 448.
Oakman v. *Small*, 282 Ill. 360, 363.
Sheahan v. *Madigan*, 275 Ill. 373, 377.
Aldridge v. *Matthews*, 257 Ill. 202, 206.

The test of jurisdiction and power is not whether a court of review would reverse the decree rendered. An Appellate Court would reverse a decree on the ground that it was rendered without jurisdiction, but it is begging the question to say that because a reviewing

court on appeal would reverse the decree, therefore it can be attacked in no manner.

People v. *Brewer*, 328 Ill. 472, 482.
O'Connor v. *Board of Trustees*, 247 Ill. 54, 57.

If a court is without jurisdiction over the subject matter, it is not material how the question of jurisdiction is brought to a court's attention.

Chicago Bank of Commerce v. *Carter*, 61 F. (2d) 986, 989.

Jurisdiction and power to adjudicate and to enter judgment cannot be conferred by consent or by failure to raise the question of power in a court of review.

Nixon v. *Michaels*, 38 F. (2d) 420, 423.
Town of Kingston v. *Anderson*, 300 Ill. 577, 582.
Rabbitt v. *Weber & Co.*, 297 Ill. 491, 495.

Consent of the parties to the suit cannot give jurisdiction to the courts of the United States where it has not been conferred by the Constitution and laws.

Cutler v. *William A. Rae*, 7 How. (U. S.) 730.
Mills v. *Brown*, 16 Pet. (U. S.) 525.

CONCLUSION.

Respondent contends that regardless of the fact that the Federal Court did assume jurisdiction and construed the Bankruptcy Act to give it jurisdiction to cancel the guaranty, yet if no such jurisdiction existed, there could never be former adjudication. *The question before this Honorable Court is whether or not the Federal Court had the jurisdiction and power, while sitting in bankruptcy under Section 77B of the Bankruptcy Act for the reorganization of a "debtor" corporation, the principal obligor in this case, to discharge and release the guar-*

antor. If that court had no such jurisdiction, then there could never be a former adjudication of petitioner's rights against the guarantor and the judgment of the Supreme Court of Illinois should therefore be affirmed.

Considerations of hardship can play no part in the decision of this case where the court clearly lacks jurisdiction. *Goldstone* v. *Payne,* 94 F. (2d) 855. Moreover, what hardship can befall petitioner when all he gave up for the release of the guaranty was one (1) share of stock in the debtor corporation? .(R. 34.)

We submit that the decision of the Supreme Court of Illinois is in accord with the decisions of this court and that it rightfully followed the decisions of the United States Circuit Courts of Appeals for the Second and Seventh Circuits in the cases of *In re Diversey Bldg. Corp.,* 86 Fed. (2d) 456; and *In re Nine North Church St., Inc.,* 82 Fed. (2d) 186 and rightfully applied the facts and law of the *Chamblin* case to the facts in the case at bar.

We further submit that the Supreme Court of Illinois *did give* that full faith, credit and effect to the decree of the Federal Court to which it was entitled and the judgment of the Supreme Court of Illinois is in accordance with the fundamental principles of law and justice and should therefore be affirmed.

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APPENDIX.

Excerpts From Cases Cited.

Williamson v. *Berry*, 8 How. 495, 540.

"It is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject matter may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter, by the party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law."

Central Fibre Products Co. v. *Bacher*, 112 S. W. (2d) 372, 376 (Mo.) Nov. 15, 1937.

"We find that the bankruptcy court has no plenary jurisdiction in equity and in application of equity, it is confined to such rules and principles as are conferred by the act. Further, the jurisdiction does not extend beyond controversies properly incidental to the administration of bankrupt estates. *Smith, et al.* v. *Chase National Bank*, 84 F. (2d) 608; *Nixon* v. *Michaels*, 38 F. (2d) 420."

103 A. S. R. 307, 309.

"Of course, if the court did not have jurisdiction over the subject matter, this could be proved by reference to the constitution and laws of the state and the pleadings in the action, *even if the attack upon it were made therein.*" * * *

"The effect of a judgment of a sister state may be avoided by proving that it did not have jurisdiction over the subject matter, or *authority* to *pronounce the judgment*, or to give the relief which it pronounced or gave. * * * Whether the court had jurisdiction over the subject matter of the action or to pronounce the judgment or give the relief in ques-

tion must be determined by an inspection of the laws of the state where the court sat, and of the record in the case in which the judgment was given, for, though the court may have had jurisdction over the subject matter or to grant the relief which it in fact granted * * * still its judgment may be avoided because it assumed to determine a question or to give relief not within the issues in the case before it. (Cases cited.)"

15 R. C. L. 929-932, Sec. 408.

"The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction, and the courts of one state are not required to regard as conclusive any judgment of the court of another state which had no jurisdiction of the subject or of the parties." (See many cases cited too numerous to set out.) "It follows, therefore, that the jurisdiction of a court rendering a judgment or decree is always open to inquiry under proper averments, where its conclusiveness is questioned in a court of another state, cases cited." * * *

"Furthermore it may be inquired whether the court had authority to give the relief which it pronounced or purported to give. Note 103 A. S. R. 309. Thus where a judgment of a court of another state declaring a corporation dissolved is in excess of the jurisdiction of the court, it will not be entitled to faith and credit in other states as a judicial proceeding. *Folger* v. *Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747. Similarly it has been held that if state laws authorizing garnishment proceedings are not complied with, a judgment therein may be pronounced void in another state without depriving it of that 'faith and credit' to which under the constitution of the United States, it is entitled in the courts of the latter state. *Tourville* v. *Wabash R. Co.*, 143 Mo. 614, 50 S. W. 300, 71 A. S. R. 650."

Thompson v. *Whitman*, 85 U. S. 457, 469.

"On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the Fourth Article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Ritchie v. *Sayers*, 100 Fed. 520, 532.

"It is well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree the particular judgment thereon that it did enter, that decree and judgment may be collaterally impeached."

Standard Oil Co. v. *Missouri*, 224 U. S. 270, 281.

"For even if a court has original general jurisdiction, criminal and civil, at law and an equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based." * * *

"Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be ab-

solutely void; because the court in rendering them would transcend the limits of its authority in those cases."

Risley v. *Phenix Bank of City of New York*, 83 N. Y. 318, 337.

"But a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally."